

Editorial

Is Our Legal System Able to Tackle Climate Change?

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Whether it's in business, politics or science, the issue of sustainability is on everyone's lips. Since it is one of the most important issues of our time, there is nothing wrong with that. We as lawyers should ask ourselves to what extent our legal system provides answers to the challenges.

Increasingly, the legal profession seems to feel a responsibility to drive this issue forward by taking cases to courts in order to bring about landmark decisions. 'Climate Change Litigation'¹ is the name given to this area, which has grown particularly in recent years. Notable decisions include the so-called 'climate decision' of the German Federal Constitutional Court ("Bundesverfassungsgericht") in 2021.² At the European level, the decision of the European Court of Human Rights (ECHR), which was brought about by the 'climate seniors' ("KlimaSeniorinnen"), can be taken into account.³ Although bringing about fundamental decisions in favour of sustainability is a highly commendable endeavour, the question can be raised (especially from the point of view of democratic legitimacy) as to whether the most important questions of our legal system should not rather be answered by the parliamentary legislature.

However, the issue of sustainability does not only concern constitutional law. There is also an aspect that has been controversially discussed in the context of the sales law warranty for defects. It is the question of whether the lack of sustainability within the production phase constitutes a material defect of the good in question.⁴ The voices in favour of a broad understanding of material defects argue that the German concept of material defects does not only cover factors that are directly connected to the item. Rather, a material defect can also be based on the economic, social or legal relationships of the item to its environment, which influence the usability or value.⁵ Changing the general understanding of when a product is considered defective would either force

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¹ <<https://climatecasechart.com>> accessed 31 October 2024.

² BVerfGE 157, 30-177.

³ *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* App no 53600/20 (ECHR, 9 April 2024).

⁴ Lukas Beck, 'Die Rechte des Käufers bei fehlender Nachhaltigkeit der Kaufsache' [2022] NJW 3313; Jan-Erik Schirmer, 'Nachhaltigkeit in den Privatrechten Europas' [2021] ZEuP 35, 43.

⁵ cf BGHZ 67, 134, 136; BGHZ 70, 47, 49.

manufacturers to critically question their process of production or at least demand them to explicitly state that their products have not been produced sustainably. Either way, sustainability would be at the front and centre in the field of commerce.

There is no doubt, that there are still gaps in our legal system regarding the issue of climate change, which raises the question of how the legislator intends to act. The so-called 'Right to repair', which was adopted in April 2024 and came into force in July 2024 as part of a directive⁶ of the European Parliament, is a positive development.⁷ The directive is part of sustainability strategy of the European Union. The main objective is to strengthen the EU repair market and reduce repair costs for consumers.⁸ It should be stressed, that the Directive still needs to be implemented into national law. However, according to Article 3 of the Directive, Member States shall not maintain or introduce in their national law provisions diverging from those laid down in this Directive.

As we can see, the current legal system is in itself somewhat equipped to deal with the challenges that our society is facing. Nonetheless, the legislator should be applauded for trying to tackle climate change. The coming years will show whether these efforts are sufficient.

⁶ Directive (EU) 2024/1799 of the European Parliament and of the Council of 13 June 2024 on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394 and Directives (EU) 2019/771 and (EU) 2020/1828.

⁷ <<https://www.europarl.europa.eu/news/en/press-room/20240419IPR20590/right-to-repair-making-repair-easier-and-more-appealing-to-consumers>> accessed 23 October 2024.

⁸ <<https://www.europarl.europa.eu/news/en/press-room/20240419IPR20590/right-to-repair-making-repair-easier-and-more-appealing-to-consumers>> accessed 23 October 2024.